

ESTTA Tracking number: **ESTTA493796**

Filing date: **09/11/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91206423
Party	Defendant Too Faced Cosmetics, LLC
Correspondence Address	SUSAN L HELLER GREENBERG TRAURIG LLP 1840 CENTURY PARK EAST, SUITE 1900 LOS ANGELES, CA 90067 UNITED STATES latm2@gtlaw.com, tacher@gtlaw.com, mantellw@gtlaw.com
Submission	Answer
Filer's Name	Candice E. Kim
Filer's e-mail	latm2@gtlaw.com
Signature	/cek/
Date	09/11/2012
Attachments	answer_ttab.pdf (56 pages)(6497371 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ALMAR SALES COMPANY, INC., a New York
corporation,

Opposer,

vs.

TOO FACED COSMETICS, LLC, a Delaware limited
liability company,

Applicant.

)
)
)
)
)
)
)
)
)
)
)

Opposition No. 91-206,423

ANSWER

Applicant TOO FACED COSMETICS, LLC (“Too Faced” or “Applicant”) hereby answers the Notice of Opposition (the “Notice”), filed August 6, 2012, of Opposer ALMAR SALES COMPANY, INC. (“Almar” or “Opposer”) as follows:

1. Applicant is without sufficient knowledge or information to form a belief as to the allegations contained in Paragraph 1 of the Notice, and therefore, denies the same.

2. Admitted.

3. Applicant admits that the phrase “having a form or appearance found in nature” may be one of the many definitions of the term “natural” but denies any implication that this phrase is the exclusive, primary or “general” meaning of the word “natural.”

4. Applicant admits that the phrase “a specialized light-sensitive sensory structure of animals that in nearly all vertebrates... is the image-forming organ of sight; especially: the nearly spherical usually paired hollow organ of sight in vertebrates that is filled with a jellylike material, is lined with a photosensitive retina, and is lodged in a bony orbit in the skull; all the visible structures within and surrounding the orbit and including eyelids, eyelashes, and eyebrows” may be one of the many definitions of the term “eye” but denies any implication that this phrase is the exclusive, primary or “general” meaning of the word “eye.”

5. Applicant admits that the specimen filed in connection with Applicant's application to register the NATURAL EYE mark ("Applicant's Mark") is a collection of eye shadows.

6. Applicant is without sufficient knowledge or information to form a belief as to the allegations contained in Paragraph 6 of the Notice, and therefore, denies the same.

7. Denied.

8. Denied.

9. Applicant admits that it did not submit evidence in support of "acquired distinctiveness" for its mark as the U.S. Patent and Trademark Office determined Applicant's mark to be suggestive and therefore, did not require any evidence of acquired distinctiveness. To the extent that Opposer's allegation implies that evidence of "acquired distinctiveness" for Applicant's mark is necessary, Applicant denies such allegations.

10. Denied.

11. Denied.

12. Applicant admits that the wording EYE is disclaimed in its trademark application for NATURAL EYE. Applicant denies all other allegations contained in Paragraph 12.

Applicant denies that Opposer is entitled to any relief, including the relief sought in the WHEREFORE clause of its Notice.

AFFIRMATIVE DEFENSES

Applicant sets forth below its affirmative defenses. By making these affirmative defenses, Applicant does not assume the burden of proving any fact, issues, or element of a cause of action where such burden properly belongs to Opposer. Moreover, nothing stated herein is intended or shall be construed as an acknowledgement that any particular issue or subject matter is relevant to Opposer's allegations.

13. Opposer's Opposition is barred because Opposer fails to state a claim upon which relief may be granted.

14. Opposer's Opposition is barred because Applicant already owns a family of NATURAL marks, including the published application for NATURAL KISS (Ser. No. 85/364,160) covering "cosmetics" in Class 3; based on use since at least as early as June 1, 2011; and prior registrations on the Principal Register for the mark NATURAL FACE (Reg. No. 4,117,855) covering "cosmetics" in Class 3; registered March 27, 2012; based on use since at least as early as June 1, 2011; and for NATURAL AT NIGHT (Reg. No. 4,198,118) covering "cosmetics" in Class 3; registered August 28, 2012; based on use since at least as early as December 15, 2011. These registrations are valid, subsisting, and in full force and effect. Copies of the registration certificates and TARR status reports are attached as Exhibit A and made part of the record in these proceedings. Opposer cannot be damaged by the issuance of Applicant's Mark because Applicant already owns a registration for the NATURAL AT NIGHT and NATURAL FACE marks for identical goods (*i.e.*, cosmetics).

15. Opposer's Opposition is barred because, assuming *arguendo*, that secondary meaning is required or otherwise necessary for Applicant to obtain registration for its NATURAL EYE mark, Applicant has acquired secondary meaning.

16. Opposer's Opposition is barred under the doctrine of unclean hands. Specifically, a lawsuit is currently pending before the U.S. District Court, in which Applicant brought suit against Opposer for infringing, among other things, Applicant's copyright, trade dress and trademarks. Attached as Exhibit B is a copy of the complaint before the U.S. District Court, Central District of California, Too Faced Cosmetics, Inc. v. Almar Sales, Co., Inc., et. al., Civil Action No. 8:11-cv-00073-CJC-MLG, filed on March 9, 2011. Among other of Applicant's marks, Opposer has infringed and continues to infringe Applicant's NATURAL EYE mark.

17. Applicant hereby gives notice that it intends to rely on any additional affirmative defenses that become available or apparent during discovery and thus reserves the right to amend its answer to assert such additional affirmative defenses.

PRAYER FOR RELIEF

WHEREFORE, Applicant contends that the Notice is without grounds and requests judgment denying the Notice and this proceeding in its entirety with prejudice.

Respectfully submitted,

GREENBERG TRAURIG, LLP

Dated: September 11, 2012

By: 

Susan L. Heller
Joseph R. Tache
Candice E. Kim
1840 Century Park East, Suite 1900
Los Angeles, California 90067
Tel: (310) 586-6568
Fax: (310) 586-0568
hellers@gtlaw.com

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **ANSWER** upon Opposer by depositing one copy thereof in the U.S. Mail, First-Class, postage prepaid, on September 11, 2012, addressed as follows:

Eric A. Prager
K&L Gates LLP
599 Lexington Avenue
New York, New York 10022-6030



Exhibit A

Generated on: This page was generated by TSDR on 2012-09-11 12:13:35 EST

Mark: NATURAL KISS

NATURAL KISS

US Serial Number:	85364160	Application Filing Date:	Jul. 06, 2011
Filed as TEAS Plus:	Yes	Currently TEAS Plus:	Yes
Register:	Principal		
Mark Type:	Trademark		
Status:	Review prior to registration completed.		
Status Date:	Sep. 06, 2012		
Publication Date:	May 29, 2012	Notice of Allowance Date:	Jul. 24, 2012

Mark Information

Mark Literal Elements:	NATURAL KISS
Standard Character Claim:	Yes. The mark consists of standard characters without claim to any particular font style, size, or color.
Mark Drawing Type:	4 - STANDARD CHARACTER MARK

Related Properties Information

Claimed Ownership of US Registrations: 4117855

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and

- Asterisks *..* identify additional (new) wording in the goods/services.

For: Cosmetics
International Class: 003 - Primary Class **U.S Class:** 001, 004, 006, 050, 051, 052
Class Status: ACTIVE
Basis: 1(a)
First Use: Jun. 01, 2011 **Use in Commerce:** Jun. 01, 2011

Basis Information (Case Level)

Filed Use:	No	Currently Use:	Yes	Amended Use:	No
Filed ITU:	Yes	Currently ITU:	No	Amended ITU:	No
Filed 44D:	No	Currently 44D:	No	Amended 44D:	No
Filed 44E:	No	Currently 44E:	No	Amended 44E:	No
Filed 66A:	No	Currently 66A:	No		
Filed No Basis:	No	Currently No Basis:	No		

Current Owner(s) Information

Owner Name: TOO FACED COSMETICS, LLC
 17361 ARMSTRONG AVE.
Owner Address: IRVINE, CALIFORNIA 92614
 UNITED STATES

Legal Entity Type: LIMITED LIABILITY COMPANY **State or Country Where Organized:** DELAWARE

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Amanda J. Mooney **Docket Number:** TOO01-2132

Correspondent

Correspondent Name/Address: Amanda J. Mooney
 Goodman Mooney
 8001 Irvine Center Drive
 Suite 1170

Irvine, CALIFORNIA 92618
UNITED STATES

Phone: 714.754.0200

Fax: 714.754.0500

Correspondent e-mail: uspto@goodmanmooney.com

Correspondent e-mail Authorized: Yes

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Sep. 07, 2012	NOTICE OF ACCEPTANCE OF STATEMENT OF USE E-MAILED	
Sep. 06, 2012	LAW OFFICE REGISTRATION REVIEW COMPLETED	70997
Aug. 31, 2012	ALLOWED PRINCIPAL REGISTER - SOU ACCEPTED	
Aug. 22, 2012	STATEMENT OF USE PROCESSING COMPLETE	66230
Aug. 02, 2012	USE AMENDMENT FILED	66230
Aug. 20, 2012	CASE ASSIGNED TO INTENT TO USE PARALEGAL	66230
Aug. 02, 2012	TEAS STATEMENT OF USE RECEIVED	
Jul. 24, 2012	NOA E-MAILED - SOU REQUIRED FROM APPLICANT	
May 29, 2012	OFFICIAL GAZETTE PUBLICATION CONFIRMATION E-MAILED	
May 29, 2012	PUBLISHED FOR OPPOSITION	
May 09, 2012	NOTIFICATION OF NOTICE OF PUBLICATION E-MAILED	
Apr. 24, 2012	LAW OFFICE PUBLICATION REVIEW COMPLETED	70997
Apr. 24, 2012	ASSIGNED TO LIE	70997
Apr. 04, 2012	APPROVED FOR PUB - PRINCIPAL REGISTER	
Mar. 29, 2012	TEAS/EMAIL CORRESPONDENCE ENTERED	88889
Mar. 28, 2012	CORRESPONDENCE RECEIVED IN LAW OFFICE	88889
Mar. 28, 2012	TEAS RESPONSE TO OFFICE ACTION RECEIVED	
Feb. 15, 2012	AUTOMATIC UPDATE OF ASSIGNMENT OF OWNERSHIP	
Oct. 06, 2011	TEAS CHANGE OF CORRESPONDENCE RECEIVED	

Sep. 28, 2011	NOTIFICATION OF PRIORITY ACTION E-MAILED	6326
Sep. 28, 2011	PRIORITY ACTION E-MAILED	6326
Sep. 28, 2011	PRIORITY ACTION WRITTEN	82413
Sep. 21, 2011	ASSIGNED TO EXAMINER	82413
Jul. 12, 2011	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	
Jul. 09, 2011	NEW APPLICATION ENTERED IN TRAM	

TM Staff and Location Information

TM Staff Information

TM Attorney:	BULLOFF, TOBY ELLEN	Law Office Assigned:	LAW OFFICE 117
---------------------	---------------------	---------------------------------	----------------

File Location

Current Location:	PUBLICATION AND ISSUE SECTION	Date in Location:	Sep. 06, 2012
--------------------------	----------------------------------	--------------------------	---------------

Assignment Abstract of Title Information

Summary

Total Assignments:	2	Applicant:	TOO FACED COSMETICS, Inc.
-------------------------------	---	-------------------	------------------------------

Assignment 1 of 2

Conveyance:	SECURITY INTEREST
Reel/Frame:	<u>4702/0865</u>
Pages:	11
Date Recorded:	Jan. 23, 2012
Supporting Documents:	<u>assignment-tm-4702-0865.pdf</u>

Assignor

Name:	<u>TOO FACED COSMETICS, LLC</u>	Execution Date:	Dec. 22, 2011
Legal Entity Type:	LIMITED LIABILITY COMPANY	State or Country Where Organized:	DELAWARE

TOO FACED COSMETICS

Name: INTERMEDIATE HOLDINGS, LLC **Execution Date:** Dec. 22, 2011
Legal Entity Type: LIMITED LIABILITY COMPANY **State or Country Where Organized:** DELAWARE

Name: TOO FACED COSMETICS INTERNATIONAL, INC. **Execution Date:** Dec. 22, 2011
Legal Entity Type: CORPORATION **State or Country Where Organized:** DELAWARE

Assignee

Name: COMERICA BANK
Legal Entity Type: A TEXAS BANKING ASSOCIATION **State or Country Where Organized:** TEXAS

Address: 39200 SIX MILE ROAD
M/C 7578
LIVONIA, MICHIGAN 48152

Correspondent

Correspondent Name: ANGELA ALVAREZ SUJEK - BODMAN PLC
Correspondent Address: 201 SOUTH DIVISION, STE. 400
ANN ARBOR, MI 48104

Domestic Representative - Not Found

Assignment 2 of 2

Conveyance: ASSIGNS THE ENTIRE INTEREST
Reel/Frame: 4713/0309 **Pages:** 7
Date Recorded: Feb. 08, 2012
Supporting Documents: assignment-tm-4713-0309.pdf

Assignor

Name: TOO FACED COSMETICS, INC. **Execution Date:** Dec. 22, 2011
Legal Entity Type: CORPORATION **State or Country Where Organized:** CALIFORNIA

Assignee

Name: TOO FACED COSMETICS, LLC

Legal Entity Type: LIMITED LIABILITY COMPANY
State or Country Where Organized: DELAWARE

Address: 17361 ARMSTRONG AVE.
IRVINE, CALIFORNIA 92614

Correspondent

Correspondent Name: AMANDA J. MOONEY

Correspondent Address: 8001 IRVINE CENTER DRIVE
SUITE 1170
IRVINE, CA 92618

Domestic Representative - Not Found

United States of America

United States Patent and Trademark Office

NATURAL FACE

Reg. No. 4,117,855

Registered Mar. 27, 2012

Int. Cl.: 3

TRADEMARK

PRINCIPAL REGISTER

TOO FACED COSMETICS, INC. (CALIFORNIA CORPORATION)
17361 ARMSTRONG AVENUE
IRVINE, CA 92614

FOR: COSMETICS, IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 6-1-2011; IN COMMERCE 6-1-2011.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "FACE", APART FROM THE MARK AS SHOWN.

SER. NO. 85-364,792, FILED 7-6-2011.

KATHERINE CHANG, EXAMINING ATTORNEY



David J. Kybas

Director of the United States Patent and Trademark Office

Generated on: This page was generated by TSDR on 2012-09-11 12:15:51 EST

Mark: NATURAL FACE

NATURAL FACE

US Serial Number:	85364792	Application Filing Date:	Jul. 06, 2011
US Registration Number:	4117855	Registration Date:	Mar. 27, 2012
Filed as TEAS Plus:	Yes	Currently TEAS Plus:	Yes
Register:	Principal		
Mark Type:	Trademark		
Status:	Registered. The registration date is used to determine when post-registration maintenance documents are due.		
Status Date:	Mar. 27, 2012		
Publication Date:	Jan. 10, 2012		

Mark Information

Mark Literal Elements:	NATURAL FACE
Standard Character Claim:	Yes. The mark consists of standard characters without claim to any particular font style, size, or color.
Mark Drawing Type:	4 - STANDARD CHARACTER MARK
Disclaimer:	"FACE"

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *..* identify additional (new) wording in the goods/services.

For: Cosmetics
International Class: 003 - Primary Class **U.S Class:** 001, 004, 006, 050, 051, 052
Class Status: ACTIVE
Basis: 1(a)
First Use: Jun. 01, 2011 **Use in Commerce:** Jun. 01, 2011

Basis Information (Case Level)

Filed Use:	Yes	Currently Use:	Yes	Amended Use:	No
Filed ITU:	No	Currently ITU:	No	Amended ITU:	No
Filed 44D:	No	Currently 44D:	No	Amended 44D:	No
Filed 44E:	No	Currently 44E:	No	Amended 44E:	No
Filed 66A:	No	Currently 66A:	No		
Filed No Basis:	No	Currently No Basis:	No		

Current Owner(s) Information

Owner Name: TOO FACED COSMETICS, Inc.
17361 Armstrong Avenue
Owner Address: Irvine, CALIFORNIA 92614
UNITED STATES

Legal Entity Type: CORPORATION **State or Country Where Organized:** CALIFORNIA

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Amanda J. Mooney **Docket Number:** TOO01-2131

Correspondent

Amanda J. Mooney
Goodman Mooney
Correspondent Name/Address: 8001 Irvine Center Drive
Suite 1170

Irvine, CALIFORNIA 92618
UNITED STATES

Phone: 714.754.0200

Fax: 714.754.0500

Correspondent e-mail: uspto@goodmanmooney.com

Correspondent e-mail Authorized: No

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Mar. 27, 2012	REGISTERED-PRINCIPAL REGISTER	
Feb. 15, 2012	ASSIGNMENT OF OWNERSHIP NOT UPDATED AUTOMATICALLY	
Jan. 10, 2012	OFFICIAL GAZETTE PUBLICATION CONFIRMATION E-MAILED	
Jan. 10, 2012	PUBLISHED FOR OPPOSITION	
Dec. 21, 2011	NOTIFICATION OF NOTICE OF PUBLICATION E-MAILED	
Dec. 03, 2011	LAW OFFICE PUBLICATION REVIEW COMPLETED	68171
Dec. 03, 2011	ASSIGNED TO LIE	68171
Nov. 08, 2011	APPROVED FOR PUB - PRINCIPAL REGISTER	
Nov. 07, 2011	TEAS/EMAIL CORRESPONDENCE ENTERED	88889
Nov. 07, 2011	CORRESPONDENCE RECEIVED IN LAW OFFICE	88889
Nov. 07, 2011	TEAS RESPONSE TO OFFICE ACTION RECEIVED	
Oct. 28, 2011	NOTIFICATION OF NON-FINAL ACTION E-MAILED	6325
Oct. 28, 2011	NON-FINAL ACTION E-MAILED	6325
Oct. 28, 2011	NON-FINAL ACTION WRITTEN	82414
Oct. 24, 2011	ASSIGNED TO EXAMINER	82414
Oct. 06, 2011	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Jul. 12, 2011	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	
Jul. 09, 2011	NEW APPLICATION ENTERED IN TRAM	

TM Staff and Location Information

TM Staff Information - None**File Location**

Current Location: PUBLICATION AND ISSUE
SECTION

Date in Location: Mar. 27, 2012

Assignment Abstract of Title Information

Summary

**Total
Assignments:** 2

Registrant: TOO FACED
COSMETICS, Inc.

Assignment 1 of 2

Conveyance: SECURITY INTEREST

Reel/Frame: 4702/0865

Pages: 11

Date Recorded: Jan. 23, 2012

**Supporting
Documents:** assignment-tm-4702-0865.pdf

Assignor

Name: TOO FACED COSMETICS,
LLC

Execution Date: Dec. 22, 2011

Legal Entity Type: LIMITED LIABILITY
COMPANY

**State or Country
Where
Organized:** DELAWARE

Name: TOO FACED COSMETICS
INTERMEDIATE
HOLDINGS, LLC

Execution Date: Dec. 22, 2011

Legal Entity Type: LIMITED LIABILITY
COMPANY

**State or Country
Where
Organized:** DELAWARE

Name: TOO FACED COSMETICS
INTERNATIONAL, INC.

Execution Date: Dec. 22, 2011

Legal Entity Type: CORPORATION

**State or Country
Where
Organized:** DELAWARE

Assignee

Name: COMERICA BANK

Legal Entity Type: A TEXAS BANKING
ASSOCIATION

**State or Country
Where
Organized:** TEXAS

Address: 39200 SIX MILE ROAD
M/C 7578
LIVONIA, MICHIGAN 48152

Correspondent

**Correspondent
Name:** ANGELA ALVAREZ SUJEK - BODMAN PLC

**Correspondent
Address:** 201 SOUTH DIVISION, STE. 400
ANN ARBOR, MI 48104

Domestic Representative - Not Found

Assignment 2 of 2

Conveyance: ASSIGNS THE ENTIRE INTEREST

Reel/Frame: 4713/0309

Pages: 7

Date Recorded: Feb. 08, 2012

**Supporting
Documents:** assignment-tm-4713-0309.pdf

Assignor

Name: TOO FACED COSMETICS,
INC.

Execution Date: Dec. 22, 2011

Legal Entity Type: CORPORATION

**State or Country
Where
Organized:** CALIFORNIA

Assignee

Name: TOO FACED COSMETICS, LLC

Legal Entity Type: LIMITED LIABILITY
COMPANY

**State or Country
Where
Organized:** DELAWARE

Address: 17361 ARMSTRONG AVE.
IRVINE, CALIFORNIA 92614

Correspondent

**Correspondent
Name:** AMANDA J. MOONEY

**Correspondent
Address:** 8001 IRVINE CENTER DRIVE
SUITE 1170
IRVINE, CA 92618

Domestic Representative - Not Found

United States of America

United States Patent and Trademark Office

NATURAL AT NIGHT

Reg. No. 4,198,118

Registered Aug. 28, 2012

Int. Cl.: 3

TRADEMARK

PRINCIPAL REGISTER

TOO FACED COSMETICS, LLC (DELAWARE LIMITED LIABILITY COMPANY)
17361 ARMSTRONG AVENUE
IRVINE, CA 92614

FOR: COSMETICS, IN CLASS 3 (U.S. CLS. 1, 4, 6, 50, 51 AND 52).

FIRST USE 6-15-2011; IN COMMERCE 12-15-2011.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-518,612, FILED 1-17-2012.

LINDA POWELL, EXAMINING ATTORNEY



David J. Kappas

Director of the United States Patent and Trademark Office

Generated on: This page was generated by TSDR on 2012-09-11 12:16:37 EST

Mark: NATURAL AT NIGHT

NATURAL AT NIGHT

US Serial Number:	85518612	Application Filing Date:	Jan. 17, 2012
US Registration Number:	4198118	Registration Date:	Aug. 28, 2012
Filed as TEAS Plus:	Yes	Currently TEAS Plus:	Yes
Register:	Principal		
Mark Type:	Trademark		
Status:	Registered. The registration date is used to determine when post-registration maintenance documents are due.		
Status Date:	Aug. 28, 2012		
Publication Date:	Jun. 12, 2012		

Mark Information

Mark Literal Elements:	NATURAL AT NIGHT
Standard Character Claim:	Yes. The mark consists of standard characters without claim to any particular font style, size, or color.
Mark Drawing Type:	4 - STANDARD CHARACTER MARK

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *..* identify additional (new) wording in the goods/services.

For: Cosmetics
International Class: 003 - Primary Class **U.S Class:** 001, 004, 006, 050, 051, 052
Class Status: ACTIVE
Basis: 1(a)
First Use: Jun. 15, 2011 **Use in Commerce:** Dec. 15, 2011

Basis Information (Case Level)

Filed Use:	Yes	Currently Use:	Yes	Amended Use:	No
Filed ITU:	No	Currently ITU:	No	Amended ITU:	No
Filed 44D:	No	Currently 44D:	No	Amended 44D:	No
Filed 44E:	No	Currently 44E:	No	Amended 44E:	No
Filed 66A:	No	Currently 66A:	No		
Filed No Basis:	No	Currently No Basis:	No		

Current Owner(s) Information

Owner Name: Too Faced Cosmetics, LLC
17361 Armstrong Avenue
Owner Address: Irvine, CALIFORNIA 92614
UNITED STATES
Legal Entity Type: LIMITED LIABILITY COMPANY **State or Country Where Organized:** DELAWARE

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Amanda J. Mooney **Docket Number:** TOO01-2143

Correspondent

Correspondent Name/Address: AMANDA J. MOONEY
GOODMAN MOONEY BERSTEIN LLP
8001 IRVINE CENTER DR STE 1170
IRVINE, CALIFORNIA 92618-2997
UNITED STATES

Phone: 949.622.0020

Fax: 949.622.0024

Correspondent e-mail: uspto@goodmanmooney.com

Correspondent e-mail Authorized: No

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Aug. 28, 2012	REGISTERED-PRINCIPAL REGISTER	
Jun. 12, 2012	OFFICIAL GAZETTE PUBLICATION CONFIRMATION E-MAILED	
Jun. 12, 2012	PUBLISHED FOR OPPOSITION	
May 23, 2012	NOTIFICATION OF NOTICE OF PUBLICATION E-MAILED	
Apr. 25, 2012	APPROVED FOR PUB - PRINCIPAL REGISTER	
Apr. 23, 2012	ASSIGNED TO EXAMINER	76933
Feb. 14, 2012	TEAS AMENDMENT ENTERED BEFORE ATTORNEY ASSIGNED	88889
Feb. 14, 2012	TEAS VOLUNTARY AMENDMENT RECEIVED	
Jan. 23, 2012	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	
Jan. 20, 2012	NEW APPLICATION ENTERED IN TRAM	

TM Staff and Location Information

TM Staff Information - None

File Location

Current Location: PUBLICATION AND ISSUE SECTION

Date in Location: Aug. 28, 2012

Exhibit B

Eric J. Goodman (SBN 210694)
David A. Bernstein (SBN 204472)
Nicholas D. Myers (SBN 251809)
BURKHALTER KESSLER
GOODMAN & GEORGE LLP
2020 Main Street, Suite 600
Irvine, California 92614
Telephone: 949.975.7500
Facsimile: 949.975.7501
iplit@bkgglaw.com

Attorneys for Plaintiff Too Faced Cosmetics, Inc.

FILED
2011 MAR -9 PM 3:45
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
SANTA ANA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

TOO FACED COSMETICS, INC., a
California corporation,

Plaintiff,

vs.

ALMAR SALES CO., INC., a New
York corporation; ROSS STORES,
INC., a Delaware corporation;
DOLLAR TREE STORES, INC., a
Virginia corporation; NATIONAL
STORES, INC. doing business as
FALLAS PAREDES, a California
corporation; BEAUTY SYSTEMS
GROUP, LLC doing business as
COSMOPROF, a Delaware
corporation; and DOES 3 through 10,

Defendants.

Case No. SACV11-00073 CJC(MLGx)

**FIRST AMENDED COMPLAINT
FOR DAMAGES**

1. Federal Copyright Infringement Under 17 U.S.C. §§ 101, *et seq.*
2. Federal Trade Dress Infringement /Federal Unfair Competition Under 15 U.S.C. § 1125(a)
3. Common Law Trademark Infringement
4. False Advertising Under Cal. Bus. & Prof. Code § 17500, *et seq.*
5. Unfair Competition Under Cal. Bus. & Prof. Code § 17200, *et seq.*
6. Unjust Enrichment
7. Demand for Accounting

-JURY TRIAL DEMANDED-

1 Plaintiff TOO FACED COSMETICS, INC. hereby complains and alleges as
2 follows:

3 **JURISDICTION AND VENUE**

4 1. As alleged in greater detail below, the matter in controversy exceeds, exclusive
5 of interest and costs, the sum specified by 28 U.S.C. § 1332. Moreover, this action
6 arises under the Copyright Act of 1976, 17 U.S.C. §§101 *et. seq.*, the Lanham Act, 15
7 U.S.C. § 1125(a), as hereinafter more fully appears, conferring Federal Question
8 jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction on Plaintiff's state
9 law claims under 28 U.S.C. § 1367.

10 2. Venue is proper in this District pursuant to 28 U.S.C. §§1391 and 1400(a) as
11 Defendants conduct business in this District, the unlawful acts of Defendants
12 complained of herein have been committed within this District and have had or will
13 have had effect in this District.

14 **PARTIES**

15 3. At all times relevant hereto, Plaintiff TOO FACED COSMETICS, INC.
16 ("Plaintiff"), was, and is, a California corporation lawfully organized under the laws of
17 the State of California, with its principal place of business in the City of Irvine, County
18 of Orange, State of California.

19 4. Upon information and belief, Defendant ALMAR SALES CO., INC. (hereinafter
20 referred to as "Defendant Almar") is, and at all times mentioned herein was, a New
21 York corporation organized under the laws of the State of New York, with its principal
22 place of business at 31 West 34th Street, 8th Floor, New York, New York.

23 5. Upon information and belief, Defendant ROSS STORES, INC. (hereinafter
24 referred to as "Defendant Ross") is, and at all times mentioned herein was, a
25 corporation organized under the laws of the State of Delaware. Defendant Ross is
26 registered and authorized to do business in California and maintains a principal place of
27 business at 4440 Rosewood Drive, Building 4, Pleasanton, California.

28 ///

1 6. Upon information and belief, Defendant DOLLAR TREE STORES, INC.
2 (hereinafter referred to as "Defendant Dollar Tree") is, and at all times mentioned
3 herein was, a corporation organized under the laws of the State of Virginia. Defendant
4 Dollar Tree maintains a principal place of business at 500 Volvo Parkway, Chesapeake,
5 Virginia and is registered and authorized to do, and does, business in California,
6 including this judicial district.

7 7. Upon information and belief, Defendant NATIONAL STORES, INC., which
8 does business as FALLAS PAREDES, (hereinafter referred to as "Defendant NSI") is,
9 and at all times mentioned herein was, a corporation organized under the laws of the
10 State of California. Defendant NSI maintains a principal place of business at 15001
11 South Figueroa Street, Gardena, California and operates over 50 retail locations in this
12 judicial district, including a location less than a mile from the Courthouse where this
13 lawsuit resides.

14 8. Upon information and belief, Defendant BEAUTY SYSTEMS GROUP, LLC
15 (hereinafter referred to as "Defendant BSG"), which does business as COSMOPROF,
16 is, and at all times mentioned herein was, a corporation organized under the laws of the
17 State of Delaware. Defendant BSG maintains a principal place of business at 3001
18 Colorado Boulevard, Denton, Texas. Defendant BSG is registered and authorized to do
19 business in California and operates numerous COSMOPROF retail locations in this
20 judicial district.

21 9. Plaintiff is unaware of the true names and capacities of the Defendants sued
22 herein as DOES 1 through 10, inclusive. Therefore, Plaintiff sues said DOES, and each
23 of them, by such fictitious names. Plaintiff is informed and believes, and thereon
24 alleges, that DOES 1 through 10, and each of them, are in some way associated with co-
25 defendants, and Plaintiff prays that their true names and capacities, when ascertained,
26 may be incorporated by appropriate amendment. Defendant Almar, Defendant Ross,
27 Defendant Dollar Tree, Defendant NSI, Defendant BSG, and DOES 1 through 10 are
28 collectively referred to as "Defendants."

10. At and during all the times hereinafter mentioned, Defendants were and are legal entities and/or individuals capable of being sued in this Court. At and during all the times and places hereinafter mentioned, the Defendants were duly authorized agents, servants, or employees of the remaining Defendants, and were at all times and places mentioned herein acting within the purpose and scope of said agency, service, and employment in connection with the matters herein alleged.

11. Plaintiff is informed and believes, and based thereon alleges, that at all times herein mentioned, Defendants were the agents, servants, employees, joint venturers, partners, subsidiaries, and/or co-conspirators of each other Defendant, and that, in performing or failing to perform the acts herein alleged, each were acting individually as well as through and in the foregoing alleged capacity and within the course and scope of such agency, employment, joint venture, partnership, subsidiary and/or conspiracy, and each other Defendant ratified and affirmed the acts and omissions of the other Defendants. Plaintiff is further informed and believes that the Defendants, in taking the actions alleged herein and/or ratifying the actions alleged herein, acted within the course and scope of such authority and, at the same time, for their own financial and individual advantage, as well as in the course and scope of such employment, agency and as an alter ego therein.

BACKGROUND FACTUAL ALLEGATIONS

COPYRIGHT

12. Plaintiff is a world-renowned cosmetics manufacturer which markets its popular, prestige cosmetics line to high end retailers, both in the United States and worldwide.

13. Plaintiff is fiercely protective of the superior quality and luxury, as well as innovation, that its brand has come to represent, sourcing only the finest ingredients for its makeup and closely monitoring manufacturing and packaging thereof. Each product represents a strong marriage of creative genius and skilled production.

///

///

1 14. To preserve the goodwill in its brand, Plaintiff strives to employ distribution
2 channels befitting of a prestige line, selling its seasonal line solely in high end retail
3 brick and mortar and online stores.

4 15. Included in Plaintiff's prestige line are three popular eye makeup palettes which
5 allow consumers to create a distinctive look, namely the Too Faced Natural Eye palette,
6 the Too Faced Liquif-Eye palette, and the Too Faced Smoky Eye palette.

7 16. Plaintiff's text, photograph(s) and 2-D artwork on the exterior packaging and the
8 interior and exterior of the products, respectively entitled the Too Faced Natural Eye
9 palette (originally created on or about January 19, 2009) (**Exhibit "A"**), the Too Faced
10 Liquif-Eye palette (originally created on or about March 8, 2006) (**Exhibit "B"**), and
11 the Too Faced Smoky Eye palette (originally created on or about July 11, 2008)
12 (**Exhibit "C"**), are wholly original and are copyrightable subject matter under the laws
13 of the United States.

14 17. Plaintiff has complied in all respects with the Copyright Act of 1976, 17 U.S.C.
15 §101 *et. seq.* and all other laws governing copyright. Plaintiff has obtained Certificates
16 of Registration for the copyrightable material in the products with the details as follows:
17 Too Faced Natural Eye Palette, Registration No. VA 1-745-839, Registration Date:
18 November 15, 2010; Too Faced Liquif-Eye Palette, Registration No. VA 1-746-987,
19 Registration Date: November 23, 2010; and Too Faced Smoky Eye Palette, Registration
20 No. VA 1-746-995, Registration Date: November 23, 2010. A true and correct copy of
21 the Certificates of Registration are attached hereto as **Exhibit "D."** The registered text,
22 photograph(s), and 2-D artwork in the exterior packaging and interior and exterior of
23 the aforementioned products will hereafter be referred to as the "Registered Works."

24 18. Since the Registered Works were created, Plaintiff has been, and still is, the sole
25 author and exclusive holder of all rights, title, and interest in and to the copyrights to
26 said Registered Works.

27 ///

1 19. Plaintiff has continuously expended substantial resources to create, market,
2 advertise, distribute and sell the Too Faced Natural Eye, Liquif-Eye, and Smoky Eye
3 palettes.

4 20. The value of Plaintiff's Too Faced Natural Eye, Liquif-Eye, and Smoky Eye
5 palettes is dependent, in part, upon the fixed number of authorized high quality products
6 in distribution.

7 21. Plaintiff is informed and believes that since at least 2010, Defendant Almar has
8 knowingly and willfully copied and counterfeited, without obtaining authorization or a
9 license from Plaintiff, Plaintiff's Registered Works to create, develop, market and
10 distribute unauthorized and infringing low quality products branded as the:

- 11 a. "Natural Eye Neutral Eye Shadow Collection" palette (**Exhibit "E"**);
- 12 b. "Natural Eye Neutral Eye Shadow Collection" compact (**Exhibit "F"**);
- 13 c. "Smoky Eye Smoky Eye Shadow Collection" compact (**Exhibit "F"**)
- 14 d. "Smoky Eye Smoky Eye Shadow Collection" palette (**Exhibit "G"**);
- 15 e. "Liquid Eye Liner & Shadow Palette" (**Exhibit "H"**);
- 16 (hereinafter "Infringing Products").

17 22. Plaintiff is informed and believes and thereon alleges that since at least 2010,
18 Defendant Almar has knowingly and willfully distributed, sold, and offered for sale,
19 low quality Infringing Products in and to consumers in California and elsewhere
20 nationally through such discount distributors as Defendants Ross, Dollar Tree, NSI, and
21 BSG.

22 23. Plaintiff is informed and believes and thereon alleges that as a result of the sale
23 and distribution of the aforementioned Infringing Products to consumers in California
24 and elsewhere nationally, Defendants, and each of them, derived economic benefit to
25 the detriment of Plaintiff.

26 24. The natural, probable, and foreseeable result of the aforesaid conduct of
27 Defendants, and each of them, has been to deprive Plaintiff of revenue, to damage
28

1 Plaintiff's goodwill, and to impose substantial expenses on Plaintiff to counteract the
2 aforesaid conduct.

3 25. Defendants, and each of them, have been unjustly enriched by their use, sale and
4 distribution of the Infringing Products.

5 26. Plaintiff is informed and believes and based thereon alleges that unless enjoined
6 by this Court, Defendants intend to continue their course of conduct, and to wrongfully
7 use, infringe upon and otherwise profit from the sale and distribution of the Infringing
8 Products.

9 27. As a direct and legal result of the acts of the Defendants alleged above, Plaintiff
10 has already and continue to suffer irreparable damage and sustain lost profits. Plaintiff
11 has no adequate remedy at law to redress all of the injuries the Defendants have caused
12 and intend to cause by their conduct. Plaintiff will continue to suffer irreparable damage
13 and sustain lost profits until the Defendants' actions alleged above are enjoined by this
14 Court.

15 **FIRST CLAIM FOR RELIEF**

16 **FOR COPYRIGHT INFRINGEMENT UNDER 17 U.S.C. §101, *et seq.***

17 **AGAINST ALL DEFENDANTS**

18 28. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 through 27,
19 inclusive, and incorporates them by reference herein.

20 29. By means of the actions complained of herein, Defendants have infringed and
21 will continue to infringe Plaintiff's copyright in and relating to the Registered Works by
22 copying, counterfeiting, distributing, selling, and/or offering for sale infringing low
23 quality products and product packaging containing reproductions of the Registered
24 Works without authorization from Plaintiffs.

25 30. Plaintiff is entitled to an injunction restraining Defendants, and all persons acting
26 in concert with them, from engaging in further such acts in violation of the copyright
27 laws.

28 ///

31. Plaintiff is further entitled to recover from Defendants, and each of them, the damages Plaintiff has sustained, and will sustain, as a result of Defendants' wrongful acts as hereinabove alleged. The amount of such damages cannot be determined at this time. Plaintiff is further entitled to recover from Defendants, and each of them, the gains, profits, and advantages Defendants have obtained as a result of their wrongful acts as hereinabove alleged. Plaintiff is at present, unable to ascertain the full extent of the gains, profits, and advantages Defendants have obtained by reason of their aforesaid acts of copyright infringement.

32. Plaintiff is also entitled to damages, pursuant to the Copyright Act of 1976, 17 U.S.C. §§ 101, *et. seq.*, for Defendants' willful and continued infringement of the Registered Works.

SECOND CLAIM FOR RELIEF

FEDERAL TRADE DRESS INFRINGEMENT/FEDERAL UNFAIR

COMPETITION UNDER 15 U.S.C. 1125(a)

AGAINST ALL DEFENDANTS

33. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 through 32, inclusive, and incorporates them by reference herein.

34. In addition to the protections afforded under the Copyright Act as set forth hereinabove, Plaintiff also has valid and existing rights in the trade dress, the non-functional, inherently distinctive features that distinguish Plaintiff's Too Faced Natural Eye, Smoky Eye and Liquif-Eye palettes from competitors' products.

35. Plaintiff's Too Faced Natural Eye, Smoky Eye and Liquif-Eye palettes incorporate numerous non-functional and inherently distinctive design features. Upon information and belief, Defendants have adopted the total image, design, and appearance of the Too Faced Smoky Eye, Liquif-Eye and Natural Eye palettes respectively and are producing and selling Infringing Products that are substantially the same size, shape, design, color, and color combination, of Plaintiff's Too Faced Natural Eye, Smoky Eye and Liquif-Eye palettes, and are so identical to Plaintiff's genuine

1 palettes that Plaintiff's customers, and the consuming public, have confused, and are
2 confusing, Defendants' Infringing Products with the authentic products of Plaintiff.

3 36. The trade dress incorporated into Plaintiff's Too Faced Natural Eye, Smoky Eye
4 and Liquif-Eye palettes is inherently distinctive, arbitrary, fanciful, and/or has acquired
5 a secondary meaning. As a direct result of Plaintiff's constant and extensive use of the
6 trade dress described above, and as a result of Plaintiff's widespread advertising in
7 various media outlets, the trade dress of Plaintiff's Too Faced Natural Eye, Smoky Eye
8 and Liquif-Eye palettes are now identified with Plaintiff's products in the public mind.
9 Plaintiff's trade dress has therefore acquired a secondary meaning signifying Plaintiff's
10 products.

11 37. On information and belief, Defendants have only sold their Infringing Products
12 with infringing trade dress since 2010, a substantial amount of time after Plaintiff's first
13 use of Plaintiff's trade dress.

14 38. On information and belief, Defendants were fully aware at the time it adopted its
15 infringing trade dress, of Plaintiff's use of the trade dress in its Too Faced Natural Eye,
16 Smoky Eye and Liquif-Eye palettes. On information and belief, Defendants
17 intentionally designed their trade dress to be confusingly similar, if not identical, to
18 Plaintiff's trade dress in an effort to willfully and unfairly trade on Plaintiff's goodwill.

19 39. Defendants' Infringing Products directly compete with Plaintiff's authentic Too
20 Faced Natural Eye, Smoky Eye and Liquif-Eye palettes, are sold under Plaintiff's trade
21 dress, and are sold in the same geographical areas.

22 40. Defendants' marketing, advertising and sale of the Infringing Products, which
23 bear the identical trade dress of Plaintiff's authentic products is false and misleading in
24 representation of fact which has caused and will continue to cause confusion and
25 mistake and deceive customers and the public as to an affiliation, connection or
26 association of Defendants' Infringing Products with Plaintiff. Defendants' conduct has
27 resulted in, and continues to result in, damage to Plaintiff's goodwill and reputation,
28 and unjustly enriches Defendants at the expense of Plaintiff.

41. Defendants' wrongful acts described herein are in violation of 15 U.S.C. 1125(a) and have damaged, and continue to damage, Plaintiff in an amount to be proven at the time of trial.

42. Plaintiff has suffered, and continues to suffer, damage as a direct result of Defendants' conduct for which monetary damages are an inadequate remedy, and such damage will continue unless the Court preliminarily and permanently enjoins and restrains Defendants' willful infringement of Plaintiff's trade dress.

THIRD CLAIM FOR RELIEF

COMMON LAW TRADEMARK INFRINGEMENT

AGAINST ALL DEFENDANTS

43. Plaintiff realleges each and every factual allegation set forth in Paragraphs 1 through 42, inclusive, and incorporates them by reference herein.

44. Included in the Too Faced Natural Eye Palette collection are several eyeshadows marketed under unique and arbitrary trademarks namely, the HEAVEN shadow, SILK TEDDY shadow, NUDE BEACH shadow, VELVET REVOLVER shadow, SEXSPRESSO shadow, PUSH-UP shadow, EROTICA shadow, HONEY POT shadow, and COCOA PUFF shadow. (**Exhibit "I"**).

45. Defendant Almar's "Natural Eye Neutral Eye Shadow Collection" palette infringes upon each of the aforementioned trademarks by identifying the eyeshadows contained therein by these same marks. (**Exhibit "J"**).

46. Such blatant use of Plaintiff's trademarks in conjunction with the distribution, sale, and/or offer for sale of Defendant Almar's "Natural Eye Neutral Eye Shadow Collection" palette constitutes infringement of Plaintiff's trademark rights under the common law.

47. As a direct and legal result of Defendants' actions, Plaintiff has suffered, and will continue to suffer, general damages according to proof at the time of trial.

48. As a direct and legal result of Defendants' unauthorized use of Plaintiff's trademarks in conjunction with the distribution, sale, and/or offer for sale of Defendant

1 Almar's "Natural Eye Neutral Eye Shadow Collection" palette, Defendants have
2 damaged and, unless restrained and enjoined by this Court, will continue to damage,
3 Plaintiff's goodwill and reputation, and have caused, and are likely to continue to cause,
4 a loss of profits for Plaintiff. Defendants' actions have caused, and, unless restrained
5 and enjoined by this Court, will continue to cause irreparable harm to Plaintiff and to
6 the public, who is confused by Defendants' infringement described hereinabove.
7 Plaintiff has no adequate remedy at law to prevent Defendants from continuing their
8 infringing actions and from injuring Plaintiff and the public.

9 49. As a further direct and legal result of Defendants' actions, Plaintiff has been
10 damaged, and will continue to sustain damage, and is entitled to receive compensation
11 arising from its lost profits and efforts necessary to minimize and/or prevent customer
12 and consumer confusion in an amount to be proven at the time of trial. In addition,
13 Plaintiff is entitled to disgorge Defendants' profits, and is entitled to interest and to its
14 attorney's fees and costs in bringing this action, all in an amount to be proven at the
15 time of trial. Plaintiff is further entitled to injunctive relief as set forth above, and to all
16 other and further forms of relief this Court deems appropriate.

17 **FOURTH CLAIM FOR RELIEF**

18 **FALSE ADVERTISING IN VIOLATION OF**

19 **CALIFORNIA BUSINESS & PROFESSIONS CODE §17500, *et seq.***

20 **AGAINST ALL DEFENDANTS**

21 50. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 through
22 49, inclusive, and incorporates them by reference herein.

23 51. The actions of Defendants herein alleged are unfair and unlawful, and also
24 violate California statutory law, including without limitation, California Business and
25 Professions Code §§17500, *et seq.*

26 52. As a result of Defendants' false and misleading advertising, potential and actual
27 consumers have been, and will continue to be, misled about the source and legitimacy
28 of the Infringing Products which are being wrongfully marketed, advertised and sold in

1 association with Plaintiff's Registered Works and trade dress. Defendants knew or
2 should have known that the advertising was untrue and/or misleading.

3 53. As a result of the above-described conduct, Defendants have been, and will
4 continue to be, unjustly enriched in profits, income and ill-gotten gains at the expense
5 of Plaintiff and California consumers.

6 54. As a further result of the above-described conduct, Plaintiffs have been, and will
7 continue to be, unjustly deprived of the full value of the good will and public image
8 associated with Plaintiff's Registered Works and trade dress.

9 55. The wrongful acts of Defendants, as alleged herein, unless restrained and
10 enjoined by order of this Court, will cause great and irreparable injury to the general
11 public and to Plaintiff, its business, reputation, and goodwill. Plaintiff has no adequate
12 remedy at law for the injuries that have been or will continue to be sustained in this
13 action.

14 **FIFTH CLAIM FOR RELIEF**

15 **FOR UNFAIR COMPETITION IN VIOLATION OF**
16 **CALIFORNIA BUSINESS & PROFESSIONS CODE §§ 17200, *et seq.***

17 **AGAINST ALL DEFENDANTS**

18 56. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 through
19 55, inclusive, and incorporates them by reference herein.

20 57. As more specifically alleged above, Defendants and each of them, engaged in
21 unlawful business practices within the meaning of California Business & Professions
22 Code § 17200 when they committed the acts as alleged in this Complaint. These
23 practices include without limitation: Defendants' unauthorized use of Plaintiff's
24 Registered Works and trademarks in connection with the marketing, advertising,
25 promotion, offering for sale, and selling of their Infringing Products; and Defendants'
26 infringement of Plaintiff's trade dress rights as alleged hereinabove.

27 58. Such acts are "unlawful" within the meaning of California Business &
28 Professions Code § 17200 because they rise to the level of being fraudulent, unfair, and

deceptive.

59. Such acts are “fraudulent” within the meaning of California Business & Professions Code § 17200 because they create a situation where Plaintiff’s prospective customers are likely to be deceived.

60. Such acts are “unfair” within the meaning of California Business & Professions Code § 17200 because they offend public policy and are immoral, unethical, oppressive and unscrupulous; and this harm far outweighs any utility of the conduct to Defendants.

61. As a proximate result of the above-described unlawful, fraudulent, unfair, and deceptive acts of Defendants and the facts herein alleged, Plaintiff has suffered, and will continue to suffer, economic losses in an amount to be proven at trial, but which is in excess of the minimum jurisdiction of this Court.

62. Plaintiff seeks to enjoin Defendants from continuing to engage in the above-described unlawful, fraudulent, unfair, and deceptive conduct.

63. Plaintiff also seeks an order that Defendants restore to the general public all funds acquired by said unlawful, fraudulent, unfair, and deceptive acts.

64. Plaintiff also seeks to recover its actual damages resulting from Defendants' unlawful, fraudulent, unfair, and deceptive conduct alleged in this Complaint all according to proof at trial.

65. As a result of the Defendants' conduct, as alleged herein, Plaintiff is entitled to recover costs of suit and reasonable attorney's fees pursuant to statute including, but not limited to, California Code of Civil Procedure § 1021.5.

SIXTH CAUSE OF ACTION

UNJUST ENRICHMENT

AGAINST ALL DEFENDANTS

66. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 through 65, inclusive, and incorporates them by reference herein.

67. The conduct of Defendants, and each of them, in selling the Infringing Products, has secured, and will secure, value to Defendants which unjustly enriches Defendants to

1 the detriment of Plaintiff. By its Complaint, Plaintiff requests the disgorgement of all
2 value unjustly earned or retained by Defendants.

3 68. As a legal result of its conduct in selling the Infringing Products, Defendants
4 have been unjustly enriched and, at the same time, are causing a loss of revenue to
5 Plaintiff to its detriment.

6 69. Plaintiff is entitled to recover from Defendants, and each of them, their unjust
7 enrichment including gains, profits and advantages they have obtained as a result of
8 their wrongful acts as hereinabove alleged. Plaintiff at present is unable to ascertain the
9 full extent of Defendants' unjust enrichment including gains, profits, and advantages
10 obtained by reason of the aforesaid wrongful conduct.

11 **SEVENTH CAUSE OF ACTION**

12 **DEMAND FOR ACCOUNTING**

13 **AGAINST ALL DEFENDANTS**

14 70. Plaintiff re-alleges each and every allegation set forth in Paragraphs 1 through
15 69, inclusive, and incorporates them by reference herein.

16 71. As alleged hereinabove, Plaintiff has an interest in all monies generated from the
17 exploitation of its exclusive rights to the copyrights in the Registered Works and its
18 trademarks.

19 72. Plaintiff is informed and believes that Defendants have generated an
20 undetermined, yet substantial amount of money, due to their unlawful commercial
21 exploitation of Plaintiff's Registered Works and trademarks.

22 73. The amount of money due from Defendants is unknown to Plaintiff and cannot
23 be ascertained without an accounting of all of Defendants' financial records related to
24 the sales generated through their infringing and unlawful activities.

25 74. As a result of Defendants' actions, Plaintiff has been damaged in an amount to be
26 proven after an accounting has been conducted. Accordingly, Plaintiff hereby requests
27 that the Court order an accounting of all of Defendants' financial records related to the
28

1 infringing activities in order to determine the sums rightfully due to Plaintiff.
2 Furthermore, Plaintiff demands that those sums be paid to them accordingly.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, Plaintiffs request judgment against Defendants, and each of
5 them, for the following:

6 **ON THE FIRST CLAIM FOR RELIEF**

7 1. That Defendants each be held to have infringed Plaintiff's copyright in the
8 Registered Works for the Too Faced Natural Eye, Smoky Eye and Liquif-Eye palettes.

9 2. That Defendants, their directors, officers, agents, servants, employees, and all
10 other persons in active concert or privity or in participation with them, be enjoined from
11 directly or indirectly infringing Plaintiff's copyrights in the Registered Works for the
12 Too Faced Natural Eye, Smoky Eye and Liquif-Eye palettes.

13 3. That Defendants, their directors, officers, agents, servants, employees, and all
14 other persons in active concert or privity or in participation with them, be enjoined to
15 return to Plaintiff any originals, copies, facsimiles, reproductions or duplicates of the
16 Registered Works for the Too Faced Natural Eye, Smoky Eye and Liquif-Eye palettes
17 in their possession, custody, or control.

18 4. That Defendants each be enjoined to deliver upon oath, to be impounded during
19 the pendency of this action, and for destruction pursuant to judgment herein, all
20 originals, copies, facsimiles, reproductions or duplicates of any work shown by the
21 evidence to infringe any of Plaintiff's copyrights.

22 5. That Defendants each be required to file with the Court and to serve on Plaintiff,
23 within 30 days after service of the Court's order as herein prayed, a report in writing
24 under oath setting forth detail the manner and form in which Defendants each complied
25 with the Court's order.

26 6. That judgment be entered for Plaintiff and against Defendants, for Plaintiff's
27 actual damages according to proof, and for any additional profits attributable to
28 infringements of Plaintiff's copyright, in accordance with proof.

7. That judgment be entered for Plaintiff and against Defendants, for damages based upon Defendants' willful acts of infringement, pursuant to the Copyright Act of 1976, 17 U.S.C. §§ 101, *et. seq.*

8. That Defendants each be required to account for all gains, profits, and advantages derived from their acts of infringement and for their other violations of law.

9. That all gains, profits, and advantages derived by Defendants of their acts of infringement and other violations of law be deemed to be in constructive trust for the benefit of Plaintiff.

10. That Plaintiff be awarded prejudgment interest at the legal rate pursuant to California Civil Code § 3336.

11. That Plaintiff be awarded exemplary/punitive damages.

12. That Plaintiff be awarded attorneys' fees and costs of suit.

13. Such other and further relief at law or in equity, to which the Court deems just and proper.

ON THE SECOND CLAIM FOR RELIEF

14. For an order enjoining Defendants from engaging in acts which are false, misleading, and deceptive within the meaning of 15 U.S.C. 1125(a).

15. For compensatory damages according to proof at time of trial.

16. For reasonable attorney's fees and costs incurred herein pursuant to 15 U.S.C. § 1117(a).

17. Such other and further relief at law or in equity, to which the Court deems just and proper.

ON THE THIRD CLAIM FOR RELIEF

18. For an order enjoining Defendants from engaging in acts of infringement.

19. For compensatory damages according to proof at time of trial.

20. For reasonable attorney's fees and costs incurred.

21. Such other and further relief at law or in equity, to which the Court deems just and proper.

ON THE FOURTH CLAIM FOR RELIEF

22. For an order enjoining Defendants from engaging in acts which are unlawful, fraudulent, unfair, and deceptive within the meaning of California Business & Professions Code § 17500.

23. For an order that Defendants restore to the general public all funds acquired through his schemes of economic and business duress which are unlawful, fraudulent, unfair, and deceptive within the meaning of California Business & Professions Code § 17500.

24. Attorneys' fees and costs of suit incurred herein pursuant to California Code of Civil Procedure Section 1021.5.

25. For an award of compensatory damages according to proof at the time of trial.

26. Such other and further relief at law or in equity, to which the Court deems just and proper.

ON THE FIFTH CLAIM FOR RELIEF

27. For an order enjoining Defendants from engaging in acts which are unlawful, fraudulent, unfair, and deceptive within the meaning of California Business & Professions Code § 17200.

28. For an order that Defendants restore to the general public all funds acquired through their infringing activities which are unlawful, fraudulent, unfair, and deceptive within the meaning of California Business & Professions Code § 17200.

29. Attorneys' fees and costs of suit incurred herein pursuant to California Code of Civil Procedure §1021.5.

30. For an award of compensatory damages according to proof at the time of trial.

31. Such other and further relief at law or in equity, to which the Court deems just and proper.

ON THE SIXTH CLAIM FOR RELIEF

32. For an award of compensatory damages according to proof at the time of trial.

33. Such other and further relief at law or in equity, to which the Court deems just
and proper.

ON THE SEVENTH CLAIM FOR RELIEF

34. That the Court order an independent accountant to conduct an accounting of all
of Defendants' financial records relating to the infringing activities in order to
determine the sums of money owed to Plaintiff.

35. Upon a determination of sums due to Plaintiff, demand is made that those sums
be paid to Plaintiff.

36. Interest at the maximum legal rate from the date said sums were due.

37. Such other and further relief at law or in equity, to which the Court deems just
and proper.

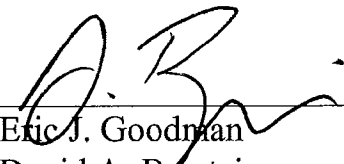
DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal
Rules of Civil Procedure.

Dated: March 9, 2011

BURKHALTER KESSLER
GOODMAN & GEORGE, LLP

By:


Eric J. Goodman
David A. Bernstein
Nicholas D. Myers
Attorneys for Plaintiff
TOO FACED COSMETICS, INC.

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action. My business address is 2020 Main Street, Suite 600, Irvine, California 92614.

On March 9, 2011, I caused a true and correct photocopy of the attached document described as: **FIRST AMENDED COMPLAINT FOR DAMAGES**, to be served on the interested parties in this action by enclosing a true and correct copy of the original in a sealed envelope addressed as follows:

Attorneys for Defendant ALMAR SALES CO., INC.

K. Tom Kohan, Esquire
KOHAN LAW FIRM
445 South Figueroa Street, 27th Floor
Los Angeles, California 90071
Tel: 310-349-1111
Fax: 213-612-7715
tom@kohanlawfirm.com

[X] BY MAIL: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

Executed on March 9, 2011 at Irvine, California.

(STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Elaine Clark

BURKHALTER KESSLER GOODMAN & GEORGE LLP
2020 MAIN STREET, SUITE 600
IRVINE, CALIFORNIA 92614







Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Registration Number
VA 1-745-839

**Effective date of
registration:**

November 15, 2010

Title _____

Title of Work: Too Faced Natural Eye Palette

Completion/Publication _____

Year of Completion: 2009

Date of 1st Publication: January 19, 2009

Nation of 1st Publication: United States

Author _____

■ **Author:** Too Faced Cosmetics, Inc.

Author Created: text, photograph(s), 2-D artwork

Work made for hire: Yes

Citizen of: United States

Domiciled in: United States

Copyright claimant _____

Copyright Claimant: Too Faced Cosmetics, Inc.

17361 Armstrong Ave., Irvine, CA, 92614, United States

Limitation of copyright claim _____

Material excluded from this claim: "Envy" silhouette artwork as featured on the exterior of the packaging and exterior of the product; the photograph of Jerrod Blandino on the rear of the product.

New material included in claim: All other artwork, text and photographs.

Rights and Permissions _____

Organization Name: Too Faced Cosmetics, Inc.

Address: 17361 Armstrong Ave.

Irvine, CA 92614 United States

Certification _____

Name: Amanda J. Mooney

Date: November 15, 2010

Applicant's Tracking Number: TOO01-301

Correspondence: Yes

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Registration Number
VA 1-746-987

Effective date of
registration:
November 23, 2010

Title _____

Title of Work: Too Faced Liquif-Eye Palette

Completion/ Publication _____

Year of Completion: 2006

Date of 1st Publication: March 8, 2006

Nation of 1st Publication: United States

Author _____

■ Author: Too Faced Cosmetics, Inc.

Author Created: text, photograph(s), 2-D artwork

Work made for hire: Yes

Citizen of: United States

Domiciled in: United States

Copyright claimant _____

Copyright Claimant: Too Faced Cosmetics, Inc.

17361 Armstrong Avenue, Irvine, CA, 92614, United States

Limitation of copyright claim _____

Material excluded from this claim: 2-D artwork

New material included in claim: text, photograph(s), 2-D artwork

Rights and Permissions _____

Organization Name: Too Faced Cosmetics, Inc.

Address: 17361 Armstrong Avenue

Irvine, CA 92614 United States

Certification _____

Name: Amanda J. Mooney

Date: November 23, 2010

Applicant's Tracking Number: TOO01-303

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Marybeth Peters

Register of Copyrights, United States of America

Registration Number
VA 1-746-995

Effective date of
registration:
November 23, 2010

Title _____

Title of Work: Too Faced Smoky Eye Palette

Completion/ Publication _____

Year of Completion: 2008

Date of 1st Publication: January 11, 2008

Nation of 1st Publication: United States

Author _____

■ Author: Too Faced Cosmetics, Inc.

Author Created: text, photograph(s), 2-D artwork

Work made for hire: Yes

Citizen of: United States

Domiciled in: United States

Copyright claimant _____

Copyright Claimant: Too Faced Cosmetics, Inc.

17361 Armstrong Avenue, Irvine, CA, 92614, United States

Limitation of copyright claim _____

Material excluded from this claim: photograph(s), 2-D artwork

New material included in claim: text, photograph(s), 2-D artwork

Rights and Permissions _____

Organization Name: Too Faced Cosmetics, Inc.

Address: 17361 Armstrong Avenue

Irvine, CA 92614 United States

Certification _____

Name: Amanda J. Mooney

Date: November 23, 2010

Applicant's Tracking Number: TOO01-302

